

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HALL & ASSOCIATES
1629 K St., N.W.
Suite 220
Washington, D.C. 20006,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460,

Defendant.

Civil Action No. _____

COMPLAINT

Preliminary Statement

1. Through this action, brought under the Freedom of Information Act (“FOIA”), U.S.C. §§ 552, *et seq.*, as amended, Plaintiff, Hall & Associates (“H&A”), appeals the Defendant’s, the United States Environmental Protection Agency (“EPA” or “Agency”), (1) improper process in responding to H&A’s FOIA Requests; (2) improper withholding of responsive records or segregable portions thereof; (3) improper use of the FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to withhold responsive documents; and (4) excessive payment requests, under FOIA.

2. This action appeals the EPA’s actions regarding FOIA Requests EPA-HQ-2018-009605 (Exhibit 1 – “2018 Request”) and EPA-HQ-2019-004353 (Exhibit 2 – “2019 Request”).

3. H&A's Requests sought an electronic copy of two EPA email distribution lists.

4. The Requests were submitted on behalf of H&A's municipal clients and the Center for Regulatory Reasonableness.

5. H&A submitted the Requests in the public interest to (1) shed light on what the government is up to, (2) demonstrate what information the government, acting in its official capacity, is distributing to third parties, and (3) provide those third parties receiving incomplete and misleading information with balanced information to fully inform the public on Agency actions.

6. These Requests do not seek or included reference to any personal information or characteristics regarding the individuals on the distribution lists, the Requests merely seek the electronic addresses.

7. The D.C. District Court has affirmed that to properly withhold responsive records under Exemption 6 "[t]he court must [] identify whether 'disclosure would compromise a substantial, as opposed to a *de minimus*, privacy interest'" and "[t]he Supreme Court has made clear that 'disclosure of a list of names and other identifying information' does not inherently violate individuals' privacy interest."¹ As the EPA did not provide a "substantial privacy interest" that would be violated by releasing the emails on the two requested lists those distribution lists must be released in full.

8. As President Johnson said when he signed FOIA into law in 1966, "[t]his legislation springs from one of our most essential principles: a democracy works best when the

¹ *AquAlliance v. United States Army Corps of Eng'rs*, 243 F. Supp. 3d 193, 197 (D.D.C. 2017) (citing *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) and *Dep't of State v. Ray*, 502 U.S. 164, 176 n.12 (1991)).

people have all the information that the security of the nation will permit.”² Congress enacted FOIA to promote transparency across the government. *See* 5 U.S.C. § 552; *Quick v. U.S. Dep’t of Commerce, Nat’l Inst. of Standards & Tech.*, 775 F. Supp. 2d 174, 179 (D.D.C. 2011) (citing *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984)). The Supreme Court has explained that FOIA is “a means for citizens to know ‘what their Government is up to.’ This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004).

9. In general, with regard to the FOIA requests at issue here, EPA has improperly refused to respond to the requests or identify the records that are responsive and required to be released under FOIA.

10. EPA has sought to charge excessive fees in responding to these requests.

11. EPA’s refusal to produce responsive records is also inconsistent with Executive Office Policy on FOIA compliance issued by Barack Obama on January 21, 2009. The Executive Memorandum states:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.³

² President Lyndon Johnson’s Statement upon Signing the FOIA (Press Release, Office of the White House Press Secretary, “Statement by the President upon Signing S.1160”, dated July 4, 1966, available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf>).

³ Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

Jurisdiction

12. Plaintiff has exhausted administrative remedies with regard to the 2018 Request.

13. Plaintiff has constructively exhausted administrative remedies with regard to the 2019 Request.

14. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

Venue

15. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

Parties

16. Plaintiff, H&A, is a Professional Limited Liability Company organized under the laws of the District of Columbia. H&A's primary purpose is to serve as a regulatory consultant and/or special counsel to municipal and private entities regarding environmental matters. Specifically, the firm has addressed wastewater regulatory issues in every EPA Region, over 40 states, and at EPA Headquarters in Washington, D.C.

17. Defendant, EPA, is an agency of the federal government of the United States, within the meaning of 5 U.S.C. § 552(e), and is located in Washington, D.C. EPA is in possession and/or control of the records requested by H&A which are the subject of this action.

Factual Allegations

A. Background of FOIA Requests

18. On July 13, 2018, EPA's Water Security Division distributed an email with the subject line "Prepare for Harmful Algal Blooms."

19. On February 14, 2019, EPA's Office of Water distributed an email with the subject line "Announcing EPA's Water Quality Modeling Webinar: 'Conestoga River Watershed HSPF and SWAT Modeling.'"

20. EPA utilizes email distribution lists to communicate with parties inside and outside of the Agency.

21. EPA has previously released email lists and records with email addresses that include domains such as gmail.com, and verizon.net.

22. EPA has previously released records that include the home addresses of third parties in written communications released by the Agency.

B. 2018 Request

23. On July 13, 2018, H&A submitted a FOIA Request to EPA Headquarters for "an electronic copy of the email distribution list of those in receipt of the July 13, 2018 EPA 'Prepare for Harmful Algal Blooms' email." Exhibit 1.

24. Over approximately five months, EPA and H&A engaged in multiple discussions regarding the processing of the 2018 Request. Exhibit 3.

25. On November 19, 2018, EPA requested a \$300 fee assurance to process the 2018 Request to redact all email addresses EPA designates as private. *Id.*, at 11.

26. On January 29, 2019, H&A filed a second administrative appeal (EPA-HQ-2019-003221) detailing the earlier discussions and challenging EPA's excessive fee assessment and refusal to timely and properly process the 2018 Request. Exhibit 4.

27. EPA refused to release any mailing list of email addresses that the Agency has designated as "private" (*e.g.*, gmail.com, Hotmail.com, yahoo.com, aol.com, etc.) under a blanket claim of FOIA Exemption 6, 5 U.S.C. §552(b)(6), to "protect information about

individuals in personnel files, when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” *Id.*

28. EPA did not provide any specific, substantial privacy interest that is inherent in being included on this email distribution list.

29. EPA did not provide to H&A any Exemption 6, privacy protection analysis as required by FOIA.

30. The final appeal determination was due on March 5, 2019 and EPA has yet to provide a final appeal determination for this request.

C. 2019 Request

31. On March 19, 2019, H&A submitted a FOIA Request to EPA Headquarters seeking “an electronic copy of the email distribution list of those in receipt of the February 14, 2019 Office of Water’s ‘Announcing EPA’s Water Quality Modeling Webinar: ‘Conestoga River Watershed HSPF and SWAT Modeling’ email.” Exhibit 2.

32. EPA’s determination was due April 16, 2019 and EPA did not timely respond to this request.

Count I: Violation of the Freedom of Information Act

33. Paragraphs 1 through 32 are incorporated by reference.

34. EPA has refused to release any record the Agency has designated as private without any stated privacy analysis.

35. FOIA Exemption 6 only protects personal information after the Agency demonstrates that there is a specific, substantial privacy interest, including the consequences that are likely to ensue, that outweigh the inherent public’s interest in letting citizens know what their government is up to.

36. EPA's request of \$300 to redact emails that are not properly exempt, without a privacy analysis explanation, is unreasonable.

37. EPA's use of the FOIA Exemption 6 was improper. *See* 5 U.S.C. §552(b)(6).

38. EPA's excessive fee assessments do not reflect a reasonable level of time and effort in violation of FOIA. *See* 5 U.S.C. §552(a)(4)(A)(ii)(I).

Relief Requested

WHEREFORE, Plaintiff, H&A, prays that this Court:

1. Maintain jurisdiction over this action until EPA is in compliance with FOIA, and every order of this Court;
2. Order EPA to respond to each of H&A's requests fully and completely;
3. Find EPA in violation for refusing to release the responsive documents, or portions thereof, in the Agency's possession;
4. Enjoin EPA from excessive exertion of FOIA Exemption 6 on the withheld documents and order EPA to release the withheld documents as not properly exempt under FOIA;
5. Enjoin EPA from charging H&A unreasonable fees given the work performed;
6. Award reasonable costs and attorney's fees to H&A provided in 5 U.S.C. §552(a)(4)(E) and/or 28 U.S.C. §2412(d); and
7. Grant any other relief as the Court may deem just and proper.

Respectfully submitted,

//s// John C. Hall
John C. Hall, Esq.
D.D.C. Bar #398172
Hall & Associates
1629 K Street, N.W., Suite 220
Washington, D.C. 20006
Email: jhall@hall-associates.com
Phone: 202.463.1166
Fax: 202.463.4207

//s// Erin Thomas

Erin Thomas

D.D.C. Bar #241311

Hall & Associates

1629 K Street, N.W., Suite 220

Washington, D.C. 20006

Email: ethomas@hall-associates.com

Phone: 202.463.1166

Fax: 202.463.4207